

STATE OF MICHIGAN
COURT OF APPEALS

NORMAN YATOOMA & ASSOCIATES, P.C.,

Plaintiff-Appellant,

v

DAVID WHITE, NANCY WHITE, and
LIGHTHOUSE GALLERIES, L.L.C.,

Defendants-Appellants.

UNPUBLISHED

November 25, 2014

No. 318068

Oakland Circuit Court

LC No. 2012-129113-CK

Before: O'CONNELL, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

In this attorney fee collection case, plaintiff appeals by right the order dismissing plaintiff's claims with prejudice for failure to comply with discovery orders. We affirm.

The dismissal arose after multiple court hearings regarding plaintiff's failure to produce e-mails within the scope of defendants' discovery requests. Plaintiff initially responded to defendants' request for production of e-mails by stating that plaintiff had no known e-mails regarding any facts or circumstances of this case. Plaintiff later served a supplemental response which stated that plaintiff did not segregate e-mails by case or case facts or circumstances. Defendants found these discovery responses unsatisfactory and filed a motion to compel.

The circuit court held five hearings to address the ongoing discovery disputes. The first hearing was in response to defendants' motion to compel. At the hearing, the circuit court questioned plaintiff's assertion that additional time was needed produce the requested documents. After hearing plaintiff's argument, the court ordered plaintiff to respond to the request for production within 21 days of the date of the hearing, and also ordered plaintiff to allow defendants to inspect plaintiff's legal file.

When the court-ordered production deadline passed, defendants filed a motion to dismiss. At the hearing on defendants' motion, the circuit court reminded plaintiff that the court's first order required plaintiff to provide a timely response to discovery and required plaintiff to allow defendants to review plaintiff's file. Specifically, the court stated, "the order is not in the disjunctive . . . It's conjunctive, and you have to do both things." The court found that plaintiff had failed to produce the file required by the court order, and that plaintiff had not requested relief or excusal from the order. The court indicated that it could impose costs on plaintiff if the parties could not resolve the discovery matter in a reasonable time.

The parties were again before the court the following month. The circuit court asked plaintiff's counsel to respond to the argument that dismissal was an appropriate discovery sanction. Plaintiff's counsel reported to the court that plaintiff had recently completed its response to the request for production in compliance with the court's order. The court found that the series of discovery motions and hearings were the consequence of plaintiff's conduct. The court noted that there were repeated "housekeeping issues" at plaintiff's office, and that defendants should be compensated for the expenses necessary to overcome the "snafus" at plaintiff's office.

After two more months of discovery, defendants filed another motion to dismiss, on the ground that plaintiff had failed to produce the e-mail outboxes of members of plaintiff's firm who were involved in billing. At the hearing on the motion, the circuit court indicated that it was considering dismissal as a sanction. The court listened to plaintiff's counsel's arguments about the difficulties of producing e-mails in outbox format. The court concluded that plaintiff must produce the responsive e-mails in outbox format, and advised plaintiff to locate a computer specialist who could assist plaintiff in producing the e-mails.

A month and a half later, defendants filed a third motion to dismiss. The circuit court held its fifth hearing on the discovery dispute, listened to arguments on the motion, and received information from plaintiff's computer specialist. The court then dismissed the case on the grounds presented by defendants.

On appeal, plaintiff contends that the circuit court erred by dismissing the case as a discovery sanction. This Court reviews the circuit court's factual findings regarding the discovery dispute for clear error. *Hardrick v Auto Club Ins Assoc*, 294 Mich App 651, 659; 819 NW2d 28 (2011). The Court reviews for an abuse of discretion the circuit court's decision to impose the sanction of dismissal. *Id.*

Plaintiff first argues at length that discovery of electronically stored information presents unique concerns, and that the circuit court failed to consider these concerns. Plaintiff's argument is inapplicable to the facts of this case, for two reasons. First, the argument disregards the requirements of MCR 2.302(B)(6). That rule places the burden on the party opposing a motion to compel to demonstrate that electronically stored information is not reasonably accessible because of undue burden or cost. In this case, plaintiff made no showing regarding accessibility of electronic information in response to defendants' first motion to compel. During the course of the discovery disputes, plaintiff did not attempt to make the requisite showing until the day of the circuit court's final hearing. On that date, plaintiff filed a second certification of compliance with discovery, in which plaintiff asserted on information and belief that upgrades and changes to plaintiff's computer system caused losses of electronically stored information. In the certification, plaintiff offered the testimony of its computer specialist. At the hearing on the motion to dismiss, plaintiff's computer specialist indicated that recovering additional electronic information would be very difficult. The specialist also noted that he did not have access to any backup materials that plaintiff may have had in its possession. The circuit court's ruling demonstrates that the court found plaintiff's certification and the specialist's explanation both belated and unpersuasive.

Second, the record confirms that the circuit court made specific inquiries of plaintiff's counsel and of plaintiff's computer specialist concerning the feasibility of retrieving electronically stored information in this case. In at least two of the hearings, the circuit court received information from both the parties' counsel concerning the electronic information that had been produced in the underlying litigation, as well as the electronic information in the possession of one of plaintiff's former attorneys. The court repeatedly asked for explanations from plaintiff's counsel concerning the alleged difficulties in sorting and retrieving e-mails. Given the circuit court's inquiries, plaintiff has not demonstrated that the circuit court failed to consider issues involving electronically stored information.

Plaintiff next argues that the circuit court failed to address the factors relevant to discovery sanctions before the court dismissed the case. We disagree. A circuit court may impose sanctions against a party that fails to comply with court-ordered discovery. MCR 2.313(B)(2). The circuit court must select a sanction that is "proportionate and just." *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 87; 618 NW2d 66 (2000); see also MCR 2.313(B)(2). Dismissal is an appropriate sanction when a party willfully refuses to comply with discovery requests. See *Bass v Combs*, 238 Mich App 16, 26-27; 604 NW2d 727 (1999) overruled in part on other grounds by *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008).

To determine whether dismissal is appropriate, a circuit court must evaluate other options for sanctions. *Thorne v Bell*, 206 Mich App 625, 633; 522 NW2d 711 (1994). The record should reflect that the court considered the specific circumstances of the discovery issues. See *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990). In *Dean*, this Court identified eight guidelines for circuit courts to consider when deciding discovery sanctions, including:

(1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) [if the violation involves identification of a witness] actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Dean*, 182 Mich App at 32-33.]

The record in this case demonstrates that the circuit court considered various discovery sanctions before dismissing the case. At the second hearing on discovery disputes, the court advised plaintiff's counsel that the imposition of costs was a permissible sanction for failure to comply with discovery orders. At the third hearing, the court indicated that plaintiff would be sanctioned with costs. The court also reminded plaintiff that dismissal was a possible discovery sanction. During the fourth hearing, the court cautioned plaintiff that the court was considering dismissal as a discovery sanction, and also indicated that plaintiff would bear the cost of a computer specialist to assist in recovering the requested e-mails. At the final hearing, the court questioned plaintiff's computer specialist about the technical aspects of e-mail retrieval before determining that dismissal was the proper sanction. The court expressly adopted defendants' arguments, which included extensive discussion of the *Dean* guidelines.

The record in this case supports the circuit court's adoption of defendants' arguments. Defendants submitted documents to the circuit court that demonstrated plaintiff's lack of compliance with the discovery orders. The parties' repeated resorts to the court for resolution of discovery disputes demonstrates plaintiff's willful violations of discovery orders; a history of failure to comply with the orders, and untimely efforts to cure the defects in the responses to discovery.

Significantly, the e-mails at issue related to allegations of improper billing practices by plaintiff. The lack of production of e-mails resulted in prejudice to defendants' ability to challenge plaintiff's allegations concerning fees that were billed to defendants. After the fifth hearing on the discovery disputes, and after reviewing the parties' multiple briefs and documentary submissions on the issue, the circuit court accepted defendants' position that the plaintiff had not complied with the discovery orders requiring production of all relevant e-mails.

Plaintiff argues that defendants' assertions presented factual issues, and that the circuit court abused its discretion by failing to hold an evidentiary hearing on the issues. In particular, plaintiff contends that resolution of defendants' assertions of spoliation of evidence required an evidentiary hearing. We disagree, on two grounds. First, the circuit court never made a finding that plaintiff had purposefully destroyed evidence. Rather, the court referenced plaintiff's "housekeeping issues" and office "snafus" as a reason for plaintiff's failure to comply with the court's orders. Second, a finding on spoliation of evidence was unnecessary to impose dismissal as a discovery sanction. Plaintiff's repeated dilatory and deficient responses to discovery during the five months preceding dismissal, combined with the court's repeated warnings concerning various discovery sanctions, were sufficient grounds to impose the drastic sanction of dismissal in this case.

Affirmed.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood